LAU CHAN CHUAH v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) October 10, 1955]

[Penang — Criminal Appeal No. 32 of 1955]

Criminal Procedure Code (Cap. 21), ss. 177 & 182 — Whether a Magistrate can convict an accused on a different charge without amending the original charge.

The appellant in this case was originally charged under para. (3)(a) of reg. 17EA of the Emergency Regulations 1951 with failing to comply with the order of the Nibong Tebal District Officer in that he was found in possession of excess restricted articles to wit 142 katties of rice and 88 katties of coconut oil. Counsel for the defence drew attention to the defects in the charge and the charge was therefore amended to one under (3)(c) of the same regulation of failing to comply with the order of the District Officer namely, failing to keep an accurate record of the daily sales of restricted articles. Evidence was given for the prosecution and the appellant having been called for his defence, gave evidence. At the close of the case for the defence the learned Magistrate found the appellant guilty on the charge under para. (3)(a) of the regulation and convicted him of this.

Held: (1) the charge under reg. 17EA(3)(a) was wrongly drawn and therefore the appellant could not properly be convicted upon it; (2) s. 177 of the Criminal Procedure Code is not applicable to a Magistrate's Court and therefore it is not permissible for a Magistrate in a summary trial after hearing the defence to convict the accused upon a charge different to that which he was charged without specifically amending the charge, re-charging the accused and giving him an opportunity to recall witnesses and to defend himself upon the new charge.

Case referred to:—

(1) *Pretty v. Solly* 26 Bea. 606, 610.

MAGISTRATE'S CRIMINAL APPEAL.

G. H. Goh for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was originally charged under paragraph (3) (a) of Regulation 17EA of the Emergency Regulations, 1951 with failing to comply with the Order of the Nibong Tebal District Officer in that he was found in possession of excess restricted articles, to wit 142 katties of rice and 88 katties of coconut oil.

This charge was clearly wrongly drawn, because sub-paragraph (a) of paragraph (3) of this Regulation says nothing about the Orders of the District Officer and merely makes it an offence to keep restricted articles in quantities exceeding those necessary for normal trade or business.

I understand that Counsel for the defence drew attention to the defects in the charge and the charge was, therefore, amended to one under paragraph (3) (c) of the same Regulation of failing to comply with the Order of the District Officer, namely, failing to keep an accurate record of the daily sales of restricted articles.

Evidence was given that the books kept by the appellant did not show accurately the stock in his possession, in that he had in stock 142 more katties of rice than was shown in his books and 88 more katties of coconut oil than was shown in his books.

At the close of the case for the prosecution no submission appears to have been made by Counsel for the defence, but I think it is clear that there was no evidence before the Court at that stage that there was anything wrong with the appellant's record of daily sales, although there was some evidence that the appellant had not kept an accurate record of the stock in his possession, contrary to sub-paragraph (b) of paragraph (3) of the same Regulation. No amendment of the charge, however, was made at that stage.

The accused having been called upon for his defence on the amended charge under sub-paragraph (c) of the Regulation gave evidence upon which I will not comment, except to say that it appeared to me that his explanation regarding the alleged excess of coconut oil might well have raised doubts as to his guilt upon any charge in respect of that oil.

At the conclusion of the case for the defence the learned Magistrate found accused guilty on the charge under paragraph (3) (a) of the Regulation and convicted him of this, although he had never been given an opportunity of defending himself upon this charge. As I have already pointed out the charge was wrongly drawn and nobody could properly have been convicted upon it as it stood; moreover, I do not think there can be any justification in a summary trial for calling upon an accused for his defence in respect of one charge and then convicting him upon a different charge.

The learned Magistrate may have been under the impression that he was acting under section 177 of the Criminal Procedure Code. This, however, is an entirely general section and in view of the particular provisions relating to summary trials I do not think it is applicable to a Magistrate's Court. The rule as to general and particular enactments in the same statute was laid down in the case of *Pretty v. Solly*[1] as follows:—

"The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

In view of the particular provisions of paragraphs (h), (i) and (j) of section 182 of the Criminal Procedure Code, which make it incumbent upon a Magistrate in a summary trial to consider the charge

and, if necessary, amend it and obtain a further plea thereon before calling upon the accused for his defence I do not think it is permissible after hearing the defence, to convict upon some different charge without specifically re-amending the charge, re-charging the accused and giving him an opportunity to recall witnesses and to defend himself upon the new charge.

For these reasons I decided that the conviction could not stand and I, therefore, set it aside and ordered a retrial, confined to the question of the possible excess of rice.

Retrial ordered.

ONG AH TOO v. REGINA

[C. C. A. (Whyatt C. J., Taylor and Tan Ah Tah JJ.) November 30, 1955]

[Singapore — Criminal Appeal No. 20 of 1955]

Criminal trial — Trial by jury — Direction — Necessity that Judge in summing-up should put the defence adequately to the jury — Penal Code ss. 149 & 300.

The appellant in this case was jointly charged with one Suppiah as follows: "That you, Ong Ah Too and Suppiah, son of Subramaniam, on or about the 12th day of May 1955 at or about 11.30 p.m. at or near Delta Road, Singapore did commit murder by causing the death of one Gene D. Symonds and that you thereby committed an offence punishable under s. 302 of the Penal Code (Cap. 20)". Alternatively: "That you, Ong Ah Too and Suppiah, son of Subramaniam, on or about the 12th day of May 1955 at or about 11.30 p.m. at or near Delta Road, Singapore, were members of an unlawful assembly the common object of which was to cause hurt to one Gene D. Symonds, and that while you were members of that assembly one or more members thereof committed murder by causing the death of the said Gene D. Symonds, an offence such as the members of that assembly knew to be likely to be committed in the prosecution of the common object thereof, and you are therefore guilty of an offence under s. 149 read with s. 300 of the Penal Code (Cap. 20) and punishable under s. 302 thereof."

Both accused were acquitted on the 1st charge and Suppiah was also acquitted on the alternative charge. The appellant was convicted on the alternative charge and sentenced to death. In his appeal against conviction, a number of grounds of appeal were raised, including the following: (a) that the jury were not sufficiently directed in regard to certain discrepancies in the evidence of the two eye-witnesses called by the prosecution; (b) that the direction to the jury on the subject of corroboration of an accomplice's evidence was not sufficiently explicit; and (c) that the appellant's defence of alibi was not adequately put to the jury in the summing-up.

Held: (1) there was a discrepancy in this case in the evidence of the two eye-witnesses as to the critical question of whether the appellant struck the victim or not during the first phase of the attack on the victim and this was a matter to which the jury's attention should have been directed in the summing-up; (2) the direction on the question of corroboration of the evidence of one of the eye-witnesses, who was an accomplice by the other eye-witness was unsatisfactory, as the learned Judge did not make any reference to the discrepancy in the evidence of the two witnesses on the important question of what the appellant actually did during the attack; (3) the learned Judge was wrong in this case in omitting to mention in his summing-up the evidence in support of the alibi and as the central issue in this case was the identification of the appellant, this omission resulted in the case for the defence not being adequately put to the jury; (4) for the above reasons, the appeal must be allowed and the conviction quashed.

COURT OF CRIMINAL APPEAL.

T. T. Rajah for the appellant.

H. B. Livingstone (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Whyatt C.J. (delivering the judgment of the Court): — The appellant and a person named Suppiah, son of Subramaniam, were charged at the September Assizes with the murder of Gene Symonds on the 12th May 1955, and alternatively with being members of an unlawful assembly which caused the death of Symonds in circumstances which made them guilty of murder contrary to sections 149 and 300 of the Penal Code. Both accused were acquitted on the first charge and Suppiah was also acquitted on the alternative charge. The appellant was convicted on the alternative charge and sentenced to death. He now appeals from that conviction.

Counsel for the appellant relied on over twenty different grounds of appeal. A number of them were misconceived and many were trivial and do not call for detailed mention in this judgment. But there are three matters of substance raised in this appeal which require careful consideration by this Court. They are, first, whether the jury were sufficiently directed in regard to certain discrepancies in the evidence of the two eye-witnesses called by the prosecution; secondly, whether the direction to the jury on the subject of corroboration of an accomplice's evidence was sufficiently explicit; and thirdly, whether the appellant's defence of an alibi was adequately put to the jury in the summing-up.

No one sought to dispute at any time during this case that Gene Symonds was attacked and murdered by a mob on the night of the 12th May. The only point at issue was whether it was established that the appellant was a member of the mob and had taken part in the attack in circumstances which made him guilty on one or other of the charges.

The prosecution sought to prove this issue by the evidence of two witnesses, Goh Ah Pong and Seet Bah Cheng. Various aspects of this evidence were properly criticised by counsel for the defence and the learned Judge was careful to mention these matters to the jury in his summing-up. But there was one discrepancy which we think was of considerable importance on which he did not comment in his summing-up. Both